Supreme Court, U.S.
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No. 99-2000

IN THE

Supreme Court of the United States

CORRECTED COPY

VIDEO TRAX, INC.,

Petitioner,

v.

NATIONSBANK, N.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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STATEMENT PURSUANT TO RULE 29.6

Petitioner, Video Trax, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Other Authority:

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FURTHER REASONS FOR GRANTING THE WRIT

I.

THE ELEVENTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH *SMILEY* AND OTHER REPORTED DECISIONS.

Respondent, NationsBank, N.A., ("NationsBank") has filed its Brief in Opposition ("Brief") to Video Trax, Inc.'s ("Video Trax") Petition for Writ of Certiorari contending among other things, that the Eleventh Circuit Court of Appeal's ("Eleventh Circuit") decision in this case does not conflict with this Court's decision in *Smiley*. However, contrary to NationsBank's belief, the Eleventh Circuit's decision in this case directly conflicts with *Smiley*.

NationsBank contends that *Smiley* involved a credit card account and this case involved a checking account. (Brief at p. 18). However, as the District Court in this case correctly noted, NationsBank assumed the role of creditor by honoring OD checks when it allowed its customers to access their undisclosed, "unofficial line of credit." Thus, NationsBank's attempt to distinguish the facts of this case from *Smiley* on the basis that *Smiley* was a credit card case should be given "short shrift" by this Court, as the District Court gave NationsBank's argument on this point in its Order denying NationsBank's Motion To Dismiss.

Since this Court's decision in *Smiley*, 12 C.F.R. § 7.4001 has not been amended or modified by the OCC in any way, shape or form. 12 C.F.R. § 7.4001 is clear and unambiguous on its face. 12 C.F.R. § 7.4001 expressly provides that the term "interest," as used in 12 U.S.C. § 85,

includes any payment compensating a creditor or prospective creditor for an extension of credit. 12 C.F.R. § 7.4001 includes under its definition of interest, among other things, overlimit fees. Thus, NationsBank's imposition of an OD fee every time it allowed its customers to access their "unofficial line of credit" is clearly interest under the definition of 12 C.F.R. § 7.4001.

In an effort to bolster its position, NationsBank attempts to rely on the filing of an Amicus brief by the OCC in this case. However, the OCC's Amicus Brief suffers from the same fallacies as NationsBank's position as more fully set forth herein. The OCC has merely adopted NationsBank's legal position in its Amicus brief. Moreover, the OCC's Amicus Brief adds nothing to the process of review, as it suffers from the same failure to recognize the important factual distinctions in this case. Furthermore, the OCC's Amicus Brief fails to recognize the stunning record admissions established by Video Trax below, as compared to the factually distinguishable decisions in the *Nicolas* and *Beech* cases.

Thus, the principles of law established by this Court in *Smiley* were ignored by both the Eleventh Circuit and the District Court in this case. Moreover, the Eleventh Circuit's decision not only conflicts with this Court's decision in *Smiley*, but with opinions of numerous courts throughout the country that have held that a variety of lender imposed fees, including overlimit fees, constitute interest. Thus, this Court should accept jurisdiction and reaffirm its decision in *Smiley*.

II.

NATIONSBANK BLATANTLY IGNORES THE SUMMARY JUDGMENT STANDARD.

NationsBank has conveniently ignored the standard by which the District Court and the Eleventh Circuit were required to review the record evidence presented below. Under Rule 56(c) of the Federal Rules of Civil Procedure, the entry of summary judgment is authorized only where the pleadings and supporting materials demonstrate that there are no genuine issues of any material fact, and that the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("evidence of a non-moving party is to be believed and all reasonable inferences are to be drawn in their favor"); *see also, United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

When addressing a motion for summary judgment, a district court must accept the facts in the light most favorable to the non-moving party, in this case, Video Trax. Here, there were clearly factual disputes as to whether, among other things, NationsBank's imposition of an OD fee every time it allowed its customers to access their undisclosed, "unofficial line of credit" was interest under 12 C.F.R. § 7.4001. In addition, there were other factual disputes including, but not limited to, the methodology employed by NationsBank in the processing of OD checks as indicated by NationsBank in its Brief.

Moreover, not only were there material issues of fact, but the undisputed facts conclusively established that there was an undisclosed, "unofficial line of credit" established by NationsBank for its customers, whereupon by its own

admission, NationsBank would impose an OD fee every time NationsBank allowed its customers to access their "unofficial line of credit." In light of these factual disputes, the Eleventh Circuit should have taken the facts in the light most favorable to Video Trax, and conducted a *de novo* review, applying the same standard as the District Court. However, the Eleventh Circuit did not. Instead, the Eleventh Circuit simply adopted the opinion of the District Court, without reviewing the record admissions Video Trax was able to establish during the course of discovery below.

NationsBank conveniently ignores its own record admissions throughout its entire Brief as those record admissions unequivocally demonstrate that the OD fee imposed by NationsBank is a fee imposed in connection with an extension of credit. Moreover, these record admissions clearly demonstrate how this case is factually distinguishable from the decisions in *Nicolas* and *Beech*, which NationsBank attempts to rely on.

III.

THE PROCESS BY WHICH AN OD AND NSF CHECK IS PROCESSED AT NATIONSBANK IS HIGHLY RELEVANT AND DISTINCTLY DIFFERENT.

NationsBank contends that it has only one integrated bad check processing system which charges exactly the same fee for processing each and every bad check, regardless of whether it is honored or returned. (Brief at p. 6). Moreover, NationsBank contends that the functional steps for processing an NSF check, versus an OD check, are irrelevant. (Brief at p. 13). However, at NationsBank, the process by which an OD fee is assessed is distinctly different from the process

where an NSF fee is assessed, which was clearly established by Video Trax below. This functional distinction is highly relevant as it clearly established a credit determination being made by NationsBank every time the bank allowed its customers to access their "unofficial line of credit."

For example, in the deposition of Roland Rodriguez ("Rodriguez"), he testified that he generated a flow chart on the methodology by which a check is processed at NationsBank.[1] This chart distinctly shows that a credit review and credit determination is made prior to the OD fee being assessed against a customers' account. Further, Rodriguez indicated that once a check is determined not to have sufficient funds in the account to cover the amount of the instrument, it goes (if not immediately determined to be an NSF "return and charge" item) into what is known as a decision matrix. Rodriguez testified that this matrix is an automated feature utilized by NationsBank to determine if the item should be paid or not, or offers advice on whether the item should be paid or not. This matrix is a credit-scoring model that takes into account a number of factors to decide whether to extend credit to a customer. In other words, the OD fee is assessed in connection with an extension of credit, whereas an NSF fee is imposed when a decision is made by the credit-scoring matrix *not* to extend credit and "bounce" a check.

Moreover, Rodriguez testified that the "default" decision, a decision which will govern the processing of a check if no affirmative step is taken to overrule it, is then passed on to the "Vector 5" system. The functionally different

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1. This chart was identified below as NB0815 and was produced by NationsBank during the course of discovery.

process of OD versus NSF processing is also addressed in the Vector 5 manual. The Vector 5 manual, a guide used by NationsBank to process and review OD and NSF decisions, also was a part of the record below.

Importantly, Rodriguez testified that if the item is paid, then, and only then, is the OD fee assessed. In other words, the OD fee is assessed only in connection with an extension of credit. Thus, NationsBank cannot ignore the distinct difference in the processing of an OD check versus an NSF check, as clearly evidenced by the testimony of NationsBank's own witnesses. Moreover, NationsBank's attempt to demonstrate to this Court that NationsBank had one integrated processing system which charges exactly the same fee for processing every bad check, regardless of whether it is honored or returned, is clearly refuted by NationsBank's own testimony. Thus, the OD fee imposed by NationsBank when an OD check is allowed to clear, versus when a check is "bounced," is clearly a fee imposed in connection with an extension of credit.

IV.

NATIONSBANK'S RELIANCE ON THE OCC'S AMICUS BRIEF IS MISPLACED.

NationsBank attempts to lend some credence to its position that the OD fee imposed in connection with its undisclosed, "unofficial line of credit" is not interest by relying on the OCC's Amicus Brief.[2] However, as previously

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2. In a further attempt to lend credibility to its contention that the OD fee at issue in this case is not interest, NationsBank cites to (Cont'd)

mentioned, the OCC's Amicus Brief failed to recognize the important factual distinctions in this case, as opposed to the *Nicolas* and *Beech* decisions, as well as the damaging record admissions by NationsBank.

In sharp contrast to the *Nicolas* and *Beech* decisions, here, NationsBank admitted that it unilaterally established secret, undisclosed, "unofficial lines of credit" for its customers. In addition, NationsBank admitted that the OD fee is only charged *after* a credit determination is made and *only* in connection with an extension of credit. Moreover, NationsBank admitted there are no additional costs associated with the processing of OD checks.

In summary, the OCC filed its Amicus Brief in this case without reviewing the huge volume of record evidence uncovered by Video Trax in the discovery process below. Such evidence clearly supports Video Trax' position that the OD fees imposed by NationsBank were imposed in connection with an admitted extension of credit and thus, are interest under 12 C.F.R. § 7.4001. Had the OCC reviewed the discovery material uncovered below, it is highly likely that based on the distinct facts of this case and NationsBank's record admissions, the OCC would have agreed with Video

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(Cont'd)
Barkley Clark, The Law Of Bank Deposits, Collections And Credit Cards ("Clark"). However, NationsBank's reliance on Clark is misplaced as Clark was not aware of the factual distinctions in the record evidence uncovered in this case as compared to *Nicolas* and *Beech*. Moreover, Video Trax assumes Clark did not have knowledge of the fact that NationsBank established secret, undisclosed, "unofficial lines of credit" for its customers, wherein NationsBank would extend credit to its customers and allow them to overdraw their accounts.

Trax' position that the OD fee imposed by NationsBank is interest. That follows logically because the OCC contended, in its Amicus Brief, that a bank charge *is* "interest," subject to the statutory cap, if it is assessed in connection with an extension of credit.

In this case, we have, by NationsBank's own admissions, the undisputed fact that every time NationsBank allowed its customers to access their undisclosed, "unofficial line of credit" NationsBank was providing an extension of credit. That being the case, the only rational conclusion anyone, including the OCC, could have reached was that the OD fee imposed by NationsBank is interest. Thus, the OCC's Amicus brief filed in the Eleventh Circuit suffers from the same deficiencies as NationsBank's contention that the OD fee imposed in this case is not interest. Thus, the OCC's Amicus Brief should be accorded little weight, if any.

V.

FLORIDA LAW DOES NOT EXCLUDE OD FEES FROM USURY CALCULATIONS.

NationsBank also misinterprets the scope and applicability of Florida law. NationsBank contends that Florida Statute § 655.954(1) specifically excludes any bad check fees in certain overdraft financing arrangements from the State's definition of interest for purposes of the usury laws. (Brief at p. 25). However, a review of Florida Statutes, § 655.954(1) clearly demonstrates that this statutory provision applies to credit card accounts. While the text of Florida Statutes § 655.954(1) references a credit card or overdraft financing arrangement, this is all within the general parameters of a credit card account. Further, Florida Statutes

§ 655.954 is merely an enabling statute, which allows the charging of any interest on such credit card arrangements. However, nowhere within the confines of the statute, or in any other provision of Florida law, statutory or otherwise, is an OD fee excluded as interest.

Additionally, NationsBank contends that Florida Statute § 655.954(2) defines "interest" as "those charges considered a finance charge under the Federal Truth-in-Lending Act" 15 U.S.C. § 1601 ("TILA") (Brief at p. 25). Moreover, NationsBank contends that TILA regulations exclude bad check processing fees, such as the OD fee at issue in this case, from the definition of "interest," thereby concluding that Florida law excludes such fees from the computation of interest for usury purposes as well. (Brief at p. 25).

While it may be true that, under the definition of TILA, OD fees may be excluded from disclosure requirements, that does not mean that OD fees are not included in the calculation of interest for usury purposes. Thus, NationsBank's reliance on Florida Statute § 655.954 and the TILA definition of interest, is certainly misplaced.

CONCLUSION

The District Court as well as the Eleventh Circuit committed error by failing to acknowledge this Court's established legal precedent, as enunciated in *Smiley*. Accordingly, Video Trax requests that this Court accept jurisdiction of this matter, grant Video Trax' Petition for a Writ of Certiorari and reverse the decision of the Eleventh Circuit Court of Appeals, as well of the District Court, and reaffirm this Court's decision in *Smiley*.

Respectfully submitted,

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